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No. 80-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JOHNSON, JR.
for the use of ERNEST T. ROSSIELLO, Attorney,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a longshoreman's attorney's lien for fees and expenses of suit a first charge and prior lien on a third party negligence action settlement fund against a vessel when the action is brought by the longshoreman himself, under § 933(a) of the Longshoremen's and Harbor Workers' Compensation Act, where the settlement is not sufficiently large to pay both the attorney's lien *and* to reimburse the stevedore in full for its compensation payments, where the stevedore did not intervene in the third party action until after the settlement was reached, and where neither the stevedore nor its insurance carrier contributed any effort, services, skill resources or finances toward assisting in the creation of the third party fund from which it seeks to have its lien paid out first in full prior to the calculation of the longshoreman's attorney's fees and expenses.

LIST OF PARTIES TO THE PROCEEDING IN THE COURTS BELOW

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

William Johnson, a longshoreman (separately represented)*

Ernest T. Rossiello, his trial court lawyer

International Great Lakes Shipping Company, the stevedore

Allstate Insurance Company, the stevedore's insurance carrier

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS:

William Johnson

International Great Lakes Shipping Company

Allstate Insurance Company

Sioux City & New Orleans Barge Lines, Inc., vessel owner

* The district court, sua sponte, appointed separate counsel, pro bono publico, to represent Johnson on appeal because of a supposed conflict of interest with his trial attorney. This is explained in the transcript of the district court's oral reasons for its decision, see appendix, p. 18a and at p. 21a *et seq.*

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WILLIAM JOHNSON, JR.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit [Docket No. 80-1450] and decided on August 21, 1980 is not yet reported, and is reproduced verbatim at p. 2a of the appendix.

A copy of the memorandum opinion and transcribed oral findings of fact and conclusions of law in support of the order of the district court is reproduced verbatim at p. 13a of the appendix.

JURISDICTION

Jurisdiction of this appeal is based on Title 28 U.S.C. § 1254(1).

The judgment appealed from was entered on August 21, 1980. A copy of the order is set forth at p. 1a of the appendix.

No petition for rehearing was applied for, nor has any application for an extension of time within which to file the instant petition for a writ of certiorari been made.

STATUTE INVOLVED

Title 33 U.S.C. § 933

[Longshoremen's and Harbor Workers' Compensation Act]

§ 933. Compensation for injuries where third persons are liable

Election of remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of compensation operating as assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensa-

tion to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment into section 944 fund operating as assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of proceedings or compromise by assignee

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed to accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a

trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of proceedings by person entitled to compensation

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

Compromise obtained by person entitled to compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to compensation as exclusive remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub.L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub.L. 92-576, § 15(f)-(h), 86 Stat. 1262.

STATEMENT OF THE CASE

William Johnson, Jr., a longshoreman, hired attorney Ernest T. Rossiello, to represent him in a third party negligence action under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act [hereinafter "LHWCA"] against Sioux City and New Orleans Barge Lines, Inc. in a claim for personal injuries sustained on January 18, 1977. At the time of the occurrence, Johnson was employed by International Great Lakes Shipping Company, a stevedoring company in Chicago [hereinafter "INGLA"]. International Great Lakes was insured by Allstate Insurance Company, its insurance carrier.[1] In addition to a third party action against the vessel owner, a claim for compensation under the LHWCA was filed for medical benefits and both temporary total and

[1] For convenience, the term "stevedore" will herein refer to both the employer, INGLA, and its insurer, Allstate.

permanent partial disability under §§ 7 and 14 of the LHWCA.[2]

The third party action was settled because of tenuous liability a few days before trial on December 1, 1978 for $64,000.00. The stevedore claimed a lien of $40,438.50 for its compensation payments made to Johnson. Johnson's attorney claimed a fee of $25,600.00 under the 40% contingent fee agreement entered into with his client, plus an additional $3,824.05 in expenses and court costs. The stevedore demanded full reimbursement for its "lien" *before* payment of the attorney's lien. The district court, ostensibly relying on the Supreme Court's recent decision in *Bloomer v. Liberty Mutual*, decided March 3, 1980 [No. 78-1418], 100 S.Ct. 925, 48 L.W. 4211, ordered the stevedore reimbursed in full first, the complete $40,438.50, then ordered plaintiff's attorney reimbursed for his costs of $3,824.05, then calculated the 40% fee on the balance remaining. [See appendix pp. 13a-19a for court's reasoning], ordering an attorney fee of $7,894.98 for the longshoreman's lawyer on the $64,000.00 settlement and ordering the balance paid to Mr. Johnson, with all the interest accrued thereon until paid.[3]

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[2] The compensation proceedings produced an award dated June 30, 1978 of 56% permanent partial loss of use of the right arm. For that proceeding a separate fee was applied for under § 928(b) of the LHWCA and 20 C.F.R. § 702.132, and awarded in the amount of $3,500.00.

[3] The defendant in the third party negligence case, at the request of the longshoreman's lawyer, Mr. Rossiello, had deposited the $64,000 in the registry of the court in a certificate of deposit at a Chicago bank. The district court tarried from January 26, 1979 until March 28, 1980 before it decided the case, even though the *Valentino*, *Fontana*, *Melvin* and *Bloomer* decisions from other circuits had been brought to its attention [discussed infra]. Over $6,000 in interest had accrued on the settlement during the pendency of the motion

(Footnote continued on following page)

Right to compensation as exclusive remedy

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Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub.L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub.L. 92-576, § 15(f)-(h), 86 Stat. 1262.

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[1] For convenience, the term "stevedore" will herein refer to both the employer, INGLA, and its insurer, Allstate.

The district court, in making its pronouncement (p. 15a, *et seq.*] stated, "All right. This morning we had a conference in chambers about this case, and I indicated to the parties how I thought it should be resolved. I don't know that either Mr. Treacy [attorney for the stevedore] or Mr. Rossiello [attorney for longshoreman] is in complete agreement with me. I know that Mr. Rossiello is not. But the Supreme Court of the United States on the 3rd of March decided Bloomer against Liberty Mutual *in which it considered the question of the payment of the employer's compensation lien as a first claim out of proceeds generated by a third party action such as this one.* [emphasis added]. That resolved one of the questions which I thought was pending before me."

The issue of the priority of liens had been fully briefed both in the district court[4] and in the Court of Appeals but the panel of the Seventh Circuit hearing the appeal *never* touched the issue, stating, "Affirmance of the district court's distribution formula makes it unnecessary to consider the relative priorities of the attorney's lien and the stevedore's lien because the settlement fund is sufficiently large to pay both in full." [App. p. 12a]

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[3] *continued*
to adjudicate the liens, first filed on January 26, 1979. On November 20, 1979 the longshoreman's attorney consented to an order allowing $3,123.85 in interest be paid directly to Mr. Johnson. The remaining interest on the settlement is still on deposit, and the district judge has ordered *all* the interest paid to Mr. Johnson, notwithstanding the stevedore and the plaintiff's lawyer have an interest in the principal funds.

[4] The clerk of the court possessed of the record has been requested to transmit the appellate record, containing the briefs therein filed and those filed in the district court, so that this court may confirm the issues raised in those courts.

Both in the district court and the court of appeals, Johnson's trial lawyer stated in his brief that he had expended approximately 300 hours of time in handling the negligence action so that a settlement could be made. An affidavit was filed and signed by Mr. Johnson and his wife re-assenting to the 40% contingent fee of $25,600 and the $3,824.05 in costs. Neither Allstate nor INGLA intervened in the third party action by attorney or otherwise, nor did either of them participate or cooperate in any manner to effectuate or oppose the settlement. Both Allstate and INGLA actively resisted the compensation claim under the LHWCA, and both were to be subpoenaed by the vessel's attorney to testify against the longshoreman before the jury in the third party action.

Because the $64,000 settlement was not large enough to pay *both* the longshoreman's agreed attorney fee *and* to reimburse the compensation carrier in full, plaintiff's lawyer urged the district court that the stevedore be required to contribute proportionately to the longshoreman's attorney's fees and expenses of suit under a line of authority which allowed it. [*Swift v. Bolten*, 517 F.2d 368 (4th Cir. 1975), see too fn. 3 *Bloomer, Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026, (5th Cir.), *cert. denied*, 412 U.S. 949 (1973)]. Plaintiff's lawyer contended in both courts below that his attorney fee should be 40% of the *full* settlement, and urged the district court to apply the proportionate rule of *Swift v. Bolten* in order that the longshoreman would be able to recover something out of the settlement fund, without the stevedore receiving a windfall. The trial court was also advised of the rule in *Strachan Shipping Company v. Melvin*, 327 F.2d 83 (5th Cir. 1964), [motion to adjudicate lien, p. 10].

The longshoreman's attorney and the stevedore could not settle the insurance carrier's lien while the case was pending in the district court. In the interim, the Supreme Court decided *Bloomer* on March 3, 1980 which dealt squarely with the issue of apportionment of attorney's fees between the longshoreman and the stevedore *in a case where the settlement was large enough to pay both liens in full.*[5] Because proportionate allocation of attorney's fees was rejected in *Bloomer* by the Supreme Court [Mr. Justice Blackmun, dissenting], plaintiff's attorney was ethically precluded from urging the proportionate fee[6] authorities and was relegated to the rule of law in *Bloomer* that the settlement be distributed under § 933(e) and in accordance with the

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[5] In *Bloomer*, the district court ordered the lawyer's one-third fee paid first in full from the $60,000.00 settlement, then ordered the stevedore reimbused in full its $17,152.83, after which the balance of $22,711.97 was awarded to the longshoreman as additional compensation. The Second Circuit affirmed, as did the Supreme Court, holding that the distribution of the fund should be no different when the longshoreman brings the action than when the stevedore does, and the formula in § 933(e) is the method of distribution.

[6] The formula urged by the longshoreman's lawyer was the rule in *Swift v. Bolten* that "the stevedore should be taxed with that part of a reasonable attorney's fee as its lien bears in proportion to the settlement". Here, $40,438.50 = 63.185% of $64,000.00 Using that ratio, the stevedore would have paid 63.185% of the attorney fee, and the stevedore would have had its lien reduced in an amount equivalent to its share of the attorney fees, since it was benefitting from the settlement more than the longshoreman. There is no question that § 933(a) gives the longshoreman the absolute right to bring the suit on his own, including choice of counsel. See *Valentino*, 552 F.2d at 468. The cause of action is *not* assigned to the stevedore *unless* the longshoreman *does not* bring suit within six months of an award in a compensation order, see § 933(b) LHWCA.

rulings of the Second Circuit in the cases of *Valentino v. Rickners Rhederei*, 552 F.2d 466 (CA 2, 1977) and *Fontana v. Pennsylvania R. Co.*, 106 F.Supp. 461 (S.D.N.Y. 1952), which treated the settlement as a fund charged first with the expense of creating it, then to reimburse the stevedore in full, if possible, and the remaining balance, if any, to the longshoreman.

The district court, however, held the contingent fee agreement applicable only to that portion of the $64,000 fund remaining after deduction first in full of the stevedore's compensation payments.[7] This method of distribution was affirmed by a panel of the Seventh Circuit partly because the panel believed "[t]he contingent fee agreement was apparently drafted on the assumption that the stevedore would share proportionately in the legal expenses of pursuing the negligence action." [Appendix, pp. 7a-8a] In a footnote [App. p. 8a] the panel makes another "assumption" that "Johnson was not fully apprised of the distinct possibility that acceptance of the $64,000 settlement offer would yield him nothing beyond the previously awarded workmen's compensation. Johnson's share of the settlement after expenses and the stevedore's reimbursement is $19,737.45, and Rossiello asserts a lien of $29,424.05. We find incredible Rossiello's suggestion that Johnson knowingly consented to a settlement that might inure only to the benefit of his attorney and his stevedore. . . ."

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[7] It should be noted the stevedore is still paying off the compensation award at $170.49/week, the final installment being due in February, 1981. It was brought to the district court's attention that under § 914(j) of the LHWCA, Johnson was entitled to an additional credit for prepayment of the future installments of compensation out of the settlement [p. 5 Motion for adjudication of lien (footnote). This calculation was not made.]

Both in the district court and in the Seventh Circuit plaintiff's lawyer informed the court that the full consequences of the settlement had been explained to Johnson. Attached to the original motion for adjudication of liens was a signed copy of the release [Ex. E], as was a full list of the expenses [Ex. B], the compensation award [Ex. A], and the contingent fee contract [Ex. C, and hereto in the appendix, p. 20a]. Plus also was filed an affidavit dated November 19, 1979 whereby Johnson reassented to the settlement and the fee. The briefs in the court below stated much authority for distribution of a longshoreman's settlement, and the district court was aware of these authorities for the entire 14 months that the motion pended before its order. Nowhere in the trial court or appellate record was any objection made to the amount of the fee by either the longshoreman or the stevedore, except to the extent that it impinged on its right to full reimbursement.

In affirming the district court's distribution the panel stated essentially two reasons for its decision:

(1) [App. p. 10a] § 928 of the LHWCA provides for "reasonable fees", and the United States Department of Labor's order of $3,600 in the compensation case was to be regarded as the fee on that part of the $64,000 which was allocable to a $40,438.50 reimbursement to the stevedore".[8]

[8] This theory seems to be novel. § 928 deals exclusively with fees for the *compensation* aspect of the case. The second $40,438.50 generated in the third party case, and which is part of the $64,000 had nothing whatsoever to do with the action against the stevedore. The right of a longshoreman to bring his own action under § 933(a) is a clear, and to retain his own private lawyer. See *Valentino, infra*, 552 F.2d at 468. Also, the per curiam opinion of the panel is clearly erroneous

(Footnote continued on following page)

(2) The plaintiff's lawyer's claim that he is entitled to a fee on the full settlement is "inconsistent with Congress' intent, expressed most recently in the 1972 amendments to the Act, 'to reduce litigation'".

Accordingly, assuming the district court had correctly applied the rule of law in *Bloomer* and had ordered paid out the stevedore's lien in full first, the panel of the Seventh Circuit affirmed the district court's action, on the basis of its "assumptions" with respect to the interpretation of the contingent fee agreement, and never even smacked of deciding the priority of lien issue raised.

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[8] *continued*
in its contention that "the contingent fee is not to be calculated on amounts *destined* for the stevedore . . . [because] . . . the Act expressly provides for the award of 'reasonable fees' to an attorney securing a workmen's compensation award for a longshoreman. 33 U.S.C. § 928 . . ., the administrative law judge awarded Rossiello $3,600 for his work in obtaining $40,438.50 in compensation benefits for Johnson." This is utter error on the part of the panel, as the two cases were separate and handled differently. The administrative law judge had no concept whatever of what was occurring in the third party case, nor did he or plaintiff's lawyer know what the third party case result would be one year later when it was settled. [The formal hearing on the compensation claim was held in December, 1977 and the decision was handed down on June 30, 1978. The $64,000 settlement was made on December 1, 1978. The district court did not decide the lien issue until March 28, 1980.

REASONS FOR ALLOWING THE WRIT

I. The decision of the panel of the Seventh Circuit is in direct conflict with the rules of law in *Fontana v. Pennsylvania R. Co.*, 106 F.Supp. 461, 463-464 (S.D.N.Y. 1952), aff'd mem. on opinion below *sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (CA 2), *cert. denied*, 346 U.S. 866 (1953); *Valentino v. Rickners Rhederei, G.m.B.H., etc.*, 552 F.2d 466 (2d Cir. 1977); *Strachan Shipping Company v. Melvin* (5th Cir. 1964) 327 F.2d 83; and *Bloomer v. Liberty Mutual*, 100 S.Ct. 925, decided by the Supreme Court on March 3, 1980, Case No. 78-1418.

II. The panel of the Seventh Circuit has decided an important question of federal law which is in direct conflict with the Supreme Court's rule in *Bloomer* that "[t]here is no reason to believe that Congress intended a different distribution [i.e., under § 933(e) LHWCA] of the expenses of suit merely because the longshoreman has brought the action" [48 L.W. 4212], which will affect all plaintiffs' lawyers who settle longshoremen's third party cases for amounts slightly larger than the amount of the lien, or who take the risk of obtaining verdicts for amounts slightly larger than the amount of the lien, before calculation of the expenses of litigation, including attorneys' fees.

III. The decision of the Seventh Circuit is not in accordance with law and equity because it gives the stevedore a windfall, unjustly enriches the stevedore and rewards it for opposing both the compensation case and the third party action. A fortiori, the decision is inequitable because if the stevedore had brought the action itself under § 933(e) it would have incurred attorney's fees, its attorneys would have had a lien for

their services *on the fund*, and they would have had a right to expect compensation for their services. To countenance the decision of the panel of the Seventh Circuit would be to exalt form over substance. *Valentino v. Rickners Rhederei, G.m.B.H.*, 552 F.2d at 469. Such an anomalous result warrants attention by the Supreme Court to settle this special and important question of federal law which recurs.

ARGUMENT

Both the district court and the panel of the Seventh Circuit have misread, misapprehended and misinterpreted the rule of law in *Bloomer v. Liberty Mutual* that there should be no difference in the distribution of the proceeds of the suit when the longshoreman brings the action than when the stevedore does. Although the LHWCA is silent on the method of distribution when the longshoreman sues the vessel, § 933(e) sets forth a formula which provides that when the stevedore sues it is entitled to recover *first* its attorney's fees and court costs, then its medical compensation payments, then its disability compensation payments, then the present cash value of future benefits, and, *only then*, may the longshoreman recover 80% of the balance. Thus, the rule is as Judge Weinfeld clearly stated in *Fontana v. Pennsylvania R. Co., supra*:

> *"Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses* and the employee becomes *entitled only to*

> *any excess finally remaining.* There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently. *The expense of securing the recovery is,* as in equity it should be, a first charge."

This was the rule adopted in *Bloomer*, and has been the rule in all the circuits which have decided the issue.[9] The few Second Circuit cases which held the longshoreman's attorney was entitled to no fee where no benefit was conferred on his client were disapproved in *Valentino v. Rickners Rhederei*, on equitable grounds, and on the ground that the stevedore had retained its own lawyers in the third party action to protect its subrogation right. However, since the 1972 Amendments to the LHWCA the stevedore is no longer impleaded in a third party action. Here, the stevedore did nothing to assist in the settlement.

The Seventh Circuit presupposed from the very first words in its opinion that the district court had correctly interpreted *Bloomer*. *Bloomer* clearly does not stand for the proposition that the stevedore's compensation lien is a first charge on the settlement fund. Mr. Justice Marshall, speaking for the Supreme Court, at footnote 13 of the opinion acknowledged that the stevedore in

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[9] The rule in *Cella v. Partenreederei M/S Ravenna*, 529 F.2d 15 (CA 1, 1975), *cert. denied*, 425 U.S. 975 (1976) is subsumed by the Supreme Court's decision in *Bloomer*. A close reading of that case shows that the longshoreman's lawyer received his full one-third fee on a $175,000.00 settlement, and the issue was whether the stevedore was required to pay a proportionate share ($10,000 was claimed) on a lien of $24,560.72 paid out by the stevedore. The First Circuit refused to apportion the fees. It is noted, of course, that the settlement was large enough to pay both liens in full, with a large balance to the longshoreman, and that the plaintiff's lawyer's fee was otherwise adequate, with no windfall to the stevedore.

Bloomer did "not challenge the approach adopted in *Fontana*, under which the expenses of suit, including attorney's fees, represent the first charge on the recovery against the third party. See S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959), [See n. 6, *Bloomer*]. Under this view, if the recovery against the shipowner is less than the sum of the lien and the expenses of suit, the longshoreman will receive the full amount of his expenses even if the remainder is insufficient to reimburse the stevedore for its lien. See *Valentino v. Rickners Rhederei.*

The Supreme Court also made clear that the *Valentino* situation was not being addressed in its *Bloomer* decision because in *Valentino* the recovery was less than the lien of the stevedore; however, certiorari should be granted in this case to resolve any doubts as to how the distribution should be in a case like this where an attorney's lien of $29,424.05 and a compensation lien of $40,438.50 cannot be paid in full out of a $64,000.00 settlement. It is certainly unfair that Allstate receive a windfall of $40,438.50 for doing nothing to contribute to the settlement. It is most unfair to the plaintiff's lawyer who financed the case on a contingent fee basis for two years duration (plus an appeal)—where the client advanced no court costs or paid any retainer or any other expense to finance the litigation.[10] Meanwhile, the

[10] Canon 5 of the Code of Professional Responsibility of the American Bar Association, DR 5-103(A) ethically permits a lawyer to have a financial interest in the outcome of litigation when he represents a client on a contingent fee basis. The contingent fee must be reasonable. Neither the stevedore nor the longshoreman challenged the reasonableness of the fee in the district court. Under the circumstances, the district court was incensed that the longshoreman had to wait in line before he recovered. Hence, he ordered the lien of the stevedore paid

(Footnote continued on following page)

longshoreman has already received his full statutory benefits, and will retain the right to have open medical attention for the rest of his life under § 907 of the LHWCA.

The Seventh Circuit's opinion that § 928 of the LHWCA calls for "reasonable fees" and its further opinion

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[10] *continued*
back first. It is contended that this was not in accordance with law. In defense of the contingent fee method of compensating lawyers, see *Valentino v. Rickners Rhederei, G.m.B.H.*, 417 F.Supp. 176 at 181 (1976). There was no suggestion of unethical conduct on the part of the longshoreman's lawyer in the district court [see transcript of proceedings of April 11, 1980, App. p. 21a, et seq.] except the innuendoes made by the panel of the Seventh Circuit whereby they "found incredible that Johnson knowingly consented to a settlement that might inure only to the benefit of his attorney and his stevedore." [fn. 5, p. 8a]. The fact is that the district court knew of the settlement the day it was reached, and a signed copy of the release with the $64,000.00 amount written on it was made a part of the record for over one year. Neither the longshoreman, nor the stevedore nor the court made any objection to the adequacy of the settlement. More importantly, there was no peculiar interpretation difficulty with the terms of the contract and the intention of the parties in the district court. [See App. p. 15a, ". . . Mr. Rossiello has a contract with Mr. Johnson which calls for payment of a contingent fee of 40 percent of the amount of gross recovery. It is my judgment . . . that [Mr. Rossiello] is not entitled to have that 40 percent agreement fee agreement applied to the $40,438.50 generated in the—the first $40,000-plus generated in the settlement of this case. . . . "] It is obvious the panel of the Seventh Circuit misapprehended the real issues in the case and justified its decision on a construction of the contract which the district court did not struggle with, and it completely avoided the issue of priority of attorney's lien vis-a-vis stevedore right to equitable reimbursement. Even a superficial reading of the briefs in both the district court and court of appeals makes clear that the petitioner sought to have the entire $64,000 charged with the 40% contingent fee agreement under § 933(a). It is the *fund itself* which is charged with the expense of creating it. Petitioner did not seek to recover 40% of Allstate's lien as a fee. He sought to have the entire fund charged with a fee the longshoreman had a right to contract for under § 933(a) of the LHWCA.

that "the administrative law judge awarded Rossiello $3,600 for his work in obtaining $40,438.50 in compensation benefits for Johnson" [Appendix p. 10a] is apparently a backing up of the district court's erroneous reasoning that "My principal reason in so ruling is that to do so would be to circumvent the statutory regulations which limit the amount of the fee that a lawyer will receive, and determines [sic] that the compensation board will fix that fee, and it has been fixed and it has been paid." [Appendix p. 16a].

Both the district court and the Seventh Circuit misapprehended the law, because there is no "statutory regulation" which limits the amount a lawyer can receive or charge for a fee in a third party action under § 933 of the LHWCA. That has always been a matter of private contract between the longshoreman and his lawyer, as in any other personal injury case. The district court and court of appeals have misapprehended § 928 and its implementing regulation, Title 20 C.F.R. § 702.132 which provides for fees in *compensation* cases. No case in the history of the LHWCA, since 1927 when it was enacted, has ever equated the separate application for attorney's fees for services performed in the compensation aspect of the case with the third party action. Moreover, the suggestion that "it would amount to little more than a double recovery for services rendered in generating the compensation award and would contravene Congress' statutory directive that the compensation tribunal determine the amount of the fee." [App. p. 10a] is completely misplaced.[11] When the administrative law

[11] The United States Department of Labor, which administers the LHWCA awards attorney's fees in compensation cases even where the longshoreman's lawyer has received a fee from

(Footnote continued on following page)

judge awarded $2,400 and the Deputy Commissioner of the U.S. Department of Labor awarded the additional $1,100 for services before the Office of Workers' Compensation Programs[12] he had no notion of what proceedings were taking place in the third party suit. Also, the fact that a fee was paid for compensation has no bearing on funds created from a third party source which benefit another. The classic cases on this subject matter are plethoric that one who creates a fund for the benefit of another is entitled to reasonable compensation from that fund for its creation. *Voris v. Gulf-Tide Stevedores* (5th Cir. 1954) Lien or no lien, there could be no recovery by the stevedore were it not for the efforts of the employee and his lawyer. *Chouest* at p. 1033.

In *Valentino*, the third party action resulted in a verdict of $5,000 after the stevedore had paid $15,488.31 in compensation benefits. The stevedore claimed the entire fund urging that, since no benefit was conferred on the longshoreman, his lawyer was not entitled to any fee. The Second Circuit held that to allow such a result would exalt form over substance. The court held the lawyer's full 40% contingent fee be paid in full first, then the balance was paid to the stevedore. The

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[11] *continued*
a third party action. See *Bell v. Calumet Harbor Terminals, Inc.*, 6 BRBS 307 (1977). Thus the "double recovery" theory of the panel has no foundation in the "statutory regulations", as the attorney fee provisions of § 928 are intended to be incentives to employers to pay compensation promptly, or be subject to penalties in the nature of the longshoreman's attorney's fees. In this regard, see § 928(d) which provides that any amounts awarded as fees in the compensation case cannot be reclaimed by the employer in its lien for "compensation."

[12] The compensation fee was actually $3,500, not $3,600 as the Seventh Circuit states.

longshoreman recovered nothing from the third party case, although he had received his full statutory allotment [as Johnson has here]. The rule in *Fontana* was followed.

In *Strachan Shipping Company v. Melvin*, a case similar to this one, the longshoreman's attorney obtained a verdict of $30,000, on which there was a claim of $27,836.92 as a compensation lien under the LHWCA. The stevedore urged it was being forced to pay a fee for an attorney it did not hire. The Fifth Circuit ordered the lawyer paid first his 40% contingent fee, and the balance to the stevedore as reimbursement. The longshoreman recovered nothing, as he had already received his full statutory benefits. These are but a few examples.

When the Seventh Circuit also speaks about a Congressional desire "to reduce litigation" and cites *Bloomer*, this is again misplaced reasoning. The desire to reduce litigation which motivated the 1972 Amendments to the LHWCA was the Amendment of § 905 which removed the warranty of seaworthiness which made a stevedore liable under that doctrine when the longshoreman was injured aboard a vessel. The desire to reduce litigation produced amended § 905(a) and (b) which provided that the stevedore could not be held to indemnify the vessel for breach of the warranty, nor could any third party actions be brought against the stevedore. This would conserve attorney's fees for stevedores who, prior to 1972, were required to defend these third party indemnity actions. As a result of the 1972 Amendments, stevedores no longer pay actual damages indirectly through third party actions, which most longshoremen brought before 1972, instead of compensation cases.

Finally, the Seventh Circuit obviously did not like the result that the injured longshoreman would derive nothing from the third party action. While petitioner conceded that the proportionate sharing of attorney's fees would be the equitable thing to do under the circumstances, it seems inevitable that the law has developed to such a point that the longshoreman must wait in line to recover after the expenses of creating the settlement fund have been paid, and after his stevedore must be reimbursed, in full if possible. Mr. Justice Blackmun regarded the decision in *Bloomer* as "crabbed" and called LHWCA cases "a litigation playground". The writ should be allowed in this final issue on the question of attorney's fees, and to harmonize the conflicting opinion of the Seventh Circuit with the results in *Valentino, Fontana, Strachan Shipping Company* and *Bloomer* and the clearly inequitable results here, in which a panel of the Seventh Circuit blindly affirmed the district court without ever considering the law with respect to the priority of liens in coming to its conclusion. Plaintiffs' lawyers are entitled to have this conflict resolved. An approximately $20,000 difference in attorney's fees is important.

PRAYER FOR RELIEF

WHEREFORE, petitioner asks that a writ of certiorari to the United States Court of Appeals for the Seventh Circuit issue to review the decision below, or, in the alternative, that summary disposition be made by simultaneously granting the writ, reversing the judgment and remanding the case to the United States Court of Appeals for the Seventh Circuit with directions that it reconsider its decision in light of *Fontana v. Pennsylvania R. Co.*, *Valentino v. Rickners Rhederei*, *Strachan Shipping Company v. Melvin*, and the Supreme Court's decision in *Bloomer v. Liberty Mutual*, decided March 3, 1980.

Respectfully submitted,

ERNEST T. ROSSIELLO, Esq.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 346-8920

Attorney for Petitioner

APPENDIX

Opinion Per Curiam

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
August 21, 1980

Before HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. EARL R. LARSON, *Senior District Judge**

WILLIAM JOHNSON, JR. and DOROTHY JOHNSON, *Plaintiffs,*	)	———
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 80-1450 v.	)	
SIOUX CITY & NEW ORLEANS BARGE LINES, INC., *Defendant,*	)	No. 77-C-535.
ALLSTATE INSURANCE COMPANY, *Intervenor-Appellee.*	)	Judge Prentice H. Marshall
	)	———

Appeal of: Ernest T. Rossiello, Attorney.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgement of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* Senior District Judge Earl R. Larson, United States District Court for the District of Minnesota, is sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1450

WILLIAM JOHNSON, JR. and DOROTHY JOHNSON,

Plaintiffs,

v.

SIOUX CITY & NEW ORLEANS BARGE LINES, INC.,

Defendant,

ALLSTATE INSURANCE COMPANY,

Intervenor-Appellee.

Appeal of: ERNEST T. ROSSIELLO,

Attorney.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-535—**Prentice H. Marshall**, *Judge.*

ARGUED JUNE 11, 1980—DECIDED AUGUST 21, 1980

Before SWYGERT and WOOD, *Circuit Judges*, and LARSON, *Senior District Judge.**

PER CURIAM. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, permits an injured longshoreman to collect workmen's compen-

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* Senior District Judge Earl R. Larson, United States District Court for the District of Minnesota, is sitting by designation.

sation payments from his stevedore *and* to sue in tort the shipowner upon whose vessel the injury occurred. *Id.* § 933.[1] Although the Act does not provide for distribution of amounts that a longshoreman recovers from a shipowner, it is now well-settled that to prevent double

[1] The original version of the Act required that an injured longshoreman elect between receiving a workmen's compensation award from his stevedore and suing the shipowner or other responsible third party for damages. Act of Mar. 4, 1927, ch. 509, § 33, 44 Stat. 1440. A 1959 amendment to the Act eliminated this requirement. Act of Aug. 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. Congress apparently felt that the election of remedies requirement "worked a hardship on an employer by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party." S. Rep. No. 428, 86th Cong., 1st Sess. 2, *reprinted in* [1959] U.S. Code Cong. & Ad. News 2134. An injured employee "usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit." *Id.*

Under the current version of the Act, codified at 33 U.S.C. § 901 *et seq.*, a longshoreman is entitled to compensation payments from his stevedore for disability or death resulting from an injury occurring on the navigable waters of the United States. *Id.* § 903. The stevedore shall pay the longshoreman's attorney a reasonable fee if the longshoreman is required to and successfully pursues a compensation action; the amount of that fee is set by the tribunal before which the compensation claim is heard. *Id.* § 928. The longshoreman is also permitted to bring a negligence action against a responsible party other than the stevedore, usually the owner of the vessel upon which the injury occurred, within six months of the receipt of his compensation award. *Id.* § 933(b). However, the longshoreman's failure to do so shall operate as an assignment to the stevedore of the longshoreman's right to recover damages from the third party. *Id.* In a suit brought pursuant to § 933(b) the stevedore may recover reasonable attorney's fees and expenses incurred in pursuing the assigned claim, the cost of workmen's compensation and other benefits paid to the longshoreman, and one-fifth of the excess amount recovered after deduction of these charges; the remaining four-fifths of the excess recovery inures to the longshoreman. *Id.* § 933(e). For a more detailed review of the Act, see Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. Mar. Law 1 (1974).

recovery the stevedore retains a lien in an amount equal to the sum of its compensation payments. *See The Etna*, 138 F.2d 37 (3d Cir. 1943).

Longshoreman William Johnson, Jr., after being injured in a barge accident, filed a claim for workmen's compensation against his stevedore, International Great Lakes Shipping Company (here represented by its insurer, Allstate Insurance Company), and a negligence suit against the owner of the barge upon which he was injured, Sioux City and New Orleans Barge Lines, Inc. Attorney Ernest T. Rossiello represented Johnson in both actions.

In the workmen's compensation portion of Johnson's case, a Department of Labor administrative law judge ordered that the stevedore pay benefits to Johnson in the amount of $40,438.50, and pursuant to 33 U.S.C. § 928 ordered that the stevedore pay Rossiello's fee in the amount of $3,600. Shortly thereafter Rossiello negotiated settlement with the shipowner in the amount of $64,000, of which $40,438.50 was subject to the stevedore's lien for reimbursement of its compensation payments to Johnson.

The focus of this unusual appeal is a contingent fee agreement that Rossiello negotiated with Johnson for the prosecution of his claim against the shipowner. That agreement provides that Johnson "hereby assigns to [Rossiello] 40% of any sums obtained or recovered therefrom by suit, settlement or otherwise."[2] Rossiello contends this agreement assigns to him 40% of the entire $64,000 proceeds, nothwithstanding that $40,438.50 inures to the stevedore as reimbursement for its compensation payments and that he has already received $3,600

[2] The agreement further provides that in the event a successful appeal is prosecuted or a new trial granted, Rossiello's share shall be 50%. An earlier agreement dated two days after the accident (the operative agreement is dated six weeks later) provided for a 33⅓% contingent fee regardless of whether an appeal proved necessary. There is no indication in the record of the reason for the increased percentage in the later agreement.

for his services in generating the compensation award. The district court ordered that Rossiello's 40% fee be calculated on the basis of Johnson's actual in-hand recovery from the shipowner, *i.e.*, $64,000 less $3,824.05 in expenses payable to Rossiello less the $40,438.50 compensation lien. Under this formula, Johnson's gross recovery is $19,737.45, which yields Rossiello a fee of $7,894.98 in addition to the statutory award of $3,600. Johnson's net recovery from the shipowner is thus $11,842.47. In contrast, if Rossiello were to prevail in his appeal, he would receive a fee of $25,600 in addition to nearly $4,000 in expenses[3] and the $3,600 already awarded for his services in the compensation proceeding. His client would receive nothing and there would remain insufficient funds, $34,575.95, to pay the stevedore's lien in full.

At the time Rossiello and Johnson entered their contingent fee agreement this circuit had not addressed the question whether a stevedore reimbursed for compensation payments must bear a proportionate share of the legal expenses of the longshoreman's suit against the shipowner. Rossiello nevertheless argued before the district court that the law was settled in the affirmative.[4] He therefore proposed the following distribution:

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[3] Rossiello also contends that the district court erred in not applying his contingent fee to that portion of the recovery used to reimburse him for expenses. Since the contingent fee agreement is silent on this point, the attorney and draftsman of the contract should bear the burden of the resulting interpretive difficulties.

[4] Our reading of the relevant case law indicates that at that time there was a distinct split among the circuits. *Compare Bloomer v. Tung*, 586 F.2d 908 (2d Cir. 1978), *aff'd sub nom. Bloomer v. Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980); *Cella v. Partenreederei MS Ravenna*, 529 F.2d 15 (1st Cir. 1975), *cert. denied*, 425 U.S. 975 (1976); *Ashcraft & Gerel v. Liberty Mutual Insurance Co.*, 343 F.2d 333 (D.C. Cir. 1965), *with Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979); *Swift v. Bolten*, 517 F.2d 368 (4th Cir. 1975). *See also Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.), *cert. denied*, 412 U.S. 949 (1973).

$64,000.00 (settlement)
× .40 (contingent fee percentage)

25,600.00 (attorney's fee)
3,824.05 (expenses)

$29,424.05 (attorney's lien)

Since the amount devoted to the stevedore's reimbursement represented 63.185% of the settlement, Rossiello proposed the stevedore bear attorney's fees and expenses in the same proportion:

$29,424.05 (attorney's lien)
× .63185

$18,591.58 (stevedore's share of attorney's lien)

The remainder of the attorney's lien, $10,832.47, would, of course, have been borne by Johnson. Thus, the settlement would have been divided as follows:

Johnson:	$12,729.37
Stevedore:	21,846.58
Rossiello:	29,424.05
	$64,000.00

In the interim, the United States Supreme Court held that when a longshoreman recovers from a shipowner an amount in excess of the compensation lien, the stevedore is entitled to reimbursement in full without being required to bear a proportionate share of the legal expenses of the negligence suit. *Bloomer v. Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980). The Court thus struck the death blow to Rossiello's proposed distribution.

Rossiello then proposed that his lien should be a first charge against the settlement despite the fact that this left his client with no recovery beyond the compensation award and left insufficient funds to reimburse the stevedore in full for its compensation payments. This proposal would have distributed the settlement proceeds as follows:

Johnson:	$ .00
Stevedore:	34,575.95
Rossiello:	29,424.05
	$64,000.00

Over Rossiello's strenuous objection, the district court instead calculated the 40% contingency fee, for which *Bloomer* made Johnson solely liable, on the settlement less expenses and less the stevedore's lien:

$64,000.00	(settlement)
− 3,824.05	(expenses)
$60,175.95	
−40,438.50	(stevedore's lien)
$19,737.45	
× .40	(contingent fee percentage)
$ 7,894.98	(attorney's fee)

The settlement was divided accordingly:

Johnson:	$11,842.47
Stevedore:	40,438.50
Rossiello:	11,719.03
	$64,000.00

Rossiello's contention that his lien represents a first charge begs the question by assuming he holds a lien on 40% of the total settlement. If, as the district court found, his contingent fee applies only to Johnson's recovery over and above expenses and the stevedore's lien, the priorities issue drops out of the case because sufficient funds would exist to pay in full both the attorney's lien and the stevedore's lien. We therefore turn first to the propriety of this portion of the district court's order.

The contingent fee agreement was apparently drafted on the assumption that the stevedore would share proportionately in the legal expenses of pursuing the

negligence action.[5] Had that assumption proven correct, Rossiello's fee from the stevedore would have been 40% of the compensation reimbursement. His fee from Johnson would have been 40% of the remainder. When the Supreme Court decided *Bloomer*, a fundamental assumption upon which the contingent fee agreement was based—that the stevedore would pay Rossiello 40% of its reimbursement—failed. In the face of that failure, Rossiello would have us read the agreement to require Johnson to pay the portion of his fee that he had expected to receive from the stevedore, leaving Johnson nothing beyond his previous compensation award while allowing Rossiello to recover again on the generation of funds for which he had already been awarded fees under section 928 of the Act. Even if Johnson had expressly consented to this result, we would hesitate to enforce an attorney-client agreement that dictates it. *See Schlesinger v. Teitelbaum*, 475 F.2d 137 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973).

The more reasonable reading of the agreement is that Johnson agreed to pay Rossiello 40% of any recovery over and above the amount inuring to the stevedore. In reaching this conclusion, we presume that Johnson retained Rossiello for the sole purpose of securing a benefit. The portion of the settlement used to reimburse the stevedore provides no benefit to Johnson since the Act does not impose upon him a personal obligation to reimburse the stevedore. Since Johnson could never "obtain or recover" that amount in any real sense, he is not obligated under the agreement to pay a fee based on that portion of the settlement. Rather, we find that

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[5] We make that assumption because the only alternative is to assume Johnson was not fully apprised of the distinct possibility that acceptance of the $64,000 settlement offer would yield him nothing beyond the previously awarded workmen's compensation. Johnson's share of the settlement after expenses and the stevedore's reimbursement is $19,737.45, and Rossiello asserts a lien of $29,424.05. We find incredible Rossiello's suggestion that Johnson knowingly consented to a settlement that might inure only to the benefit of his attorney and his stevedore. *See* note 4 *supra*.

Rossiello assumed the risk that the stevedore would not be required to pay him 40% of the reimbursement. As an attorney and as a fiduciary, Rossiello was in the better position to foresee that the district court might follow the case law rejecting proportional sharing of legal expenses or, as happened, that the Supreme Court would reject the notion that the stevedore should share in the expenses of suit. Furthermore, as the draftsman of the agreement, he was in the better position to insert express language dealing with this possibility, though we might still have reformed the agreement for reasons of fundamental fairness.[6]

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[6] Although an attorney may contract with a client for a contingent fee, *see* Disciplinary Rule (DR) 5-103(A) of the American Bar Association Code of Professional Responsibility, his right to do so is not unrestrained. *See Cappel v. Adams*, 434 F.2d 1278 (1970). The right to contract is limited to a "reasonable" contingent fee. DR 5-103(A). Thus, even if the agreement had provided for calculation of the fee on the amount of the stevedore's reimbursement, we would still be faced with the question whether the fee so calculated is fair. DR 2-106(A) cautions that "[a] lawyer shall not enter into an agreement for, charge, or collect [a] clearly excessive fee." A fee is clearly excessive "when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B). In light of these criteria, we prefer our conclusion that the parties did not contract for a contingent fee calculated on the amount of the stevedore's reimbursement.

Furthermore, had the agreement expressly provided for distribution in the manner Rossiello suggests, it would contravene one of the underlying assumptions of a fair and reasonable contingent fee contract—that an attorney provide legal services in exchange for a fee based on a fixed proportion of the benefit inuring to his client. Under the approach urged upon us, Johnson would be taxed not only on funds he recovered but also on an additional amount he could never recover. *Cf.* Ethical Consideration 5-7 ("a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client"). The result Rossiello suggests is not proportional sharing. A distribution of 100% to the attorney technically may be a proportion, but we fail to discern any sense of sharing.

That the contingent fee is not to be calculated on amounts destined for the stevedore is clearly supported by the language of the Act and its underlying policies. The Act expressly provides for the award of "reasonable fees" to an attorney securing a workmen's compensation award for a longshoreman. 33 U.S.C. § 928. *See* note 1 *supra*. Pursuant to that provision, the administrative law judge awarded Rossiello $3,600 for his work in obtaining $40,438.50 in compensation benefits for Johnson. Rossiello, who did not appeal the amount of the award, received payment in full from the stevedore. A further award based on those funds would allow Rossiello to recover a fee exceeding the statutorily-prescribed "reasonable fees." As such it would amount to little more than a double recovery for services rendered in generating the compensation award and would contravene Congress' statutory directive that the compensation tribunal determine the amount of the fee.

Furthermore, the distribution Rossiello suggests is inconsistent with Congress' intent, expressed most recently in the 1972 amendments to the Act, "to reduce litigation." *Bloomer*, 100 S. Ct. at 932. We are cognizant of Congress' concern that negligence suits under the Act too often inure to the benefit only of the attorney, thereby needlessly increasing the volume of litigation generated by the Act. *See id.* Yet this is precisely the outcome proposed. Indeed, Rossiello would recover a fee of over $25,000 plus expenses of nearly $4,000 for a settlement that in practical effect leaves his former client in a poorer position than the one he occupied the day before filing suit against the shipowner. The settlement, of course, extinguished any rights Johnson may have had with respect to the shipowner. Had Johnson instead declined to bring suit, his rights against the shipowner would have been automatically assigned after six months to the stevedore. 33 U.S.C. § 933(e). Had the stevedore then successfully sued the shipowner, Johnson would have received 80% of the recovery in excess of the stevedore's compensation payments and expenses of suit. *Id.*

In the event the longshoreman does not bring suit against the shipowner within six months—presumably because there is little potential for substantial recovery over and above the compensation award—the stevedore, using its own attorneys and making its own assessment of the likelihood and amount of recovery, can bring suit. *Id.* That statutory mechanism encourages the stevedore to sue when the negligence claim appears meritorious but the longshoreman's potential incremental recovery is small. Thus, Rossiello's approach, which gives the attorney a fee based on the benefit to the stevedore, encourages litigation brought nominally on behalf of the longshoreman in cases where the stevedore's interest is relatively greater than the longshoreman's. Such reflexive litigation brought on behalf of a party with minimal interest in the outcome is inconsistent with the Act's "special incentives designed to encourage the stevedore to bring suit on its own if the longshoreman elects not to do so." *Bloomer*, 100 S. Ct. at 932 n.12. Congress, we believe, intended that the stevedore pursue those cases rather than the longshoreman's attorney, who may be motivated by an artificially inflated contingent fee.

We have here an attorney appealing to us against the interest of a client he represented before the district court.[7] In this connection, the words of Ethical Consideration 2-23 of the American Bar Association Code of Professional Responsibility bear reproduction:

> A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Though in the procedural posture of this case, Rossiello did not sue his client, as a practical matter, he and Johnson occupied adversarial stances. We doubt very much that the district court's determination that

[7] Judge Marshall arranged for separate counsel to represent Johnson in this appeal.

Rossiello is entitled to $7,894.98 in fees and $3,824.05 in expenses in addition to the $3,600 statutory award is equivalent to the kind of "fraud or gross imposition" that would justify suing a client.

Affirmance of the district court's distribution formula makes it unnecessary to consider the relative priorities of the attorney's lien and the stevedore's lien because the settlement fund is sufficiently large to pay both in full.

AFFIRMED.[8]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[8] Rossiello claimed in a motion for recusal of Judge Marshall, the denial of which is not appealed, that Judge Marshall told him in chambers: "Rossiello, you're not getting 40% of $64,000 from me. You might get it on the 27th floor, but you're not getting it down here." The only apparent error below is Judge Marshall's evaluation of Rossiello's likelihood of success on appeal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 535

WILLIAM JOHNSON, JR., et al.,

Plaintiffs,

v.

SIOUX CITY & NEW ORLEANS BARGE LINES, INC.,

Defendant.

MEMORANDUM ORDER

For the reasons stated on the record in open court on March 28, 1980:

On the motions of International Great Lakes Shipping Company for the use of Allstate Insurance Company and plaintiff to adjudicate the employer's compensation lien and plaintiffs' counsel's attorney's lien, it is ordered that the settlement proceeds on deposit with the clerk of this Court be distributed as follows:

1. To Allstate Insurance Company the sum of $40,-438.50 as and for the compensation lien;

2. To Ernest Rossiello the sum of $3,824.05 as and for reimbursement of expenses;

3. To Ernest Rossiello the sum of $7,894.98 as and for attorney's fees;

4. To William Johnson, Jr. and Dorothy Johnson, the entire balance including all interest which accrues thereon until the fund is disbursed.

ENTER:
/s/ PRENTICE H. MARSHALL
United States District Judge

DATED: March 28, 1980.

[1]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 535

WILLIAM JOHNSON, JR., and DOROTHY JOHNSON,
Plaintiffs,

vs.

SIOUX CITY & NEW ORLEANS BARGE LINES, INC.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE PRENTICE H. MARSHALL, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 28, 1980, at 9:30 o'clock a.m.

PRESENT:

ERNEST T. ROSSIELLO, Esq.,
on behalf of plaintiffs;

JOHN TREACY, Esq.,
on behalf of defendant.

[2]

THE CLERK: 77 C 535.

MR. ROSSIELLO: Good morning, Judge, Ernest Rossiello for the plaintiff.

MR. TREACY: John Treacy for the intervenor.

THE COURT: All right. This morning we had a conference in chambers about this case, and I indicated to the parties how I thought it should be resolved.

I don't know that either Mr. Treacy or Mr. Rossiello is in complete agreement with me. I know that Mr. Rossiello is not.

But the Supreme Court of the United States on the 3rd of March decided Bloomer against Liberty Mutual in which it considered the question of the payment of the employer's compensation lien as a first claim out of proceeds generated by a third-party action such as this one.

That resolved one of the questions which I thought was pending before me.

In our conference this morning, we agreed from a dollar standpoint that if the payments, the compensation payments are continued to be made to Mr. Johnson, that the total payout to him in compensation payments and medical expenses will be $40,438.50.

And as I read Bloomer, International Great Lakes Shipping Company, Mr. Johnson's employer, and its carrier, Allstate Insurance Company, are entitled to the

[3]

reimbursement of that sum as and for their compensation lien.

And an order will be entered to that effect.

There then arises the question of adjudicating Mr. Rossiello's attorney's fees as well as his claim for reimbursement of expenses.

The parties are in agreement that Mr. Rossiello received a fee of $3500 from Allstate for his services in the compensation proceeding which resulted in benefits to Mr. Johnson of the figure I have previously mentioned, $40,438.50.

Mr. Rossiello has a contract with Mr. Johnson which calls for the payment of a contingent fee of 40 percent of the amount of gross recovery.

It is my judgment, and it is my ruling, and Mr. Rossiello disagrees with this, that he is not entitled to have that 40 percent fee agreement applied to the $40,-

438.50 generated in the—the first 40,000-plus generated in the settlement of this case, which incidentally, was for $64,000.

My principal reason in so ruling is that to do so would be to circumvent the statutory regulations which limit the amount of the fee that a lawyer will receive, and determines that the compensation board will fix that fee, and it has been fixed and it has been paid.

The result is in my judgment that Mr. Rossiello's fee contract should be applied to the amount that Mr. Johnson realizes in increase of his compensation award, as a

[4]

result of this common law action.

The initial figure of increase would be determined by subtracting from $64,000 the $40,438.50 that's going to be paid to Allstate. That gives us a net figure of 23,-561.50.

Mr. Rossiello has advanced expenses in this case of $3,824.05. That is undisputed. And he should be reimbursed for that amount, and it should be subtracted from the $23,000 figure that I have just mentioned, leaving an increase to Johnson of 19,737.44.

In earlier proceedings in this case, I have made some comments with respect to 40 percent—a 40-percent contingent fee agreement on a settlement.

In light of the Bloomer case and the fact that Mr. Rossiello is now not going to be compensated for generating the funds to satisfy the Allstate lien, a result contrary to that which I had previously announced in this case, and in light of the fact that the difference between a fee of a third and a fee of 40 percent in this case is not de minimus but approached it, I am not going to engage in a controversy with Mr. Rossiello over the 40 percent figure, and I am going to award him a fee based upon 40 percent of the increase that the Johnsons realized; namely, 40 percent of 19,373.44, which, according to my arithmetic is $7894.98.

I don't know that that's right

MR. ROSSIELLO: I will give it to you now. I have my

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calculator.

THE COURT: Give me your calculation. These wealthy plaintiffs' lawyers can't go out without a calculator.

MR. ROSSIELLO: $6,579.15.

THE COURT: How much.

MR. ROSSIELLO: One-third—I am sorry, I took a third.

THE COURT: Oh, the one-third. Are you agreeing to a third, Mr. Rossiello?

MR. ROSSIELLO: No, I am not, Judge.

THE COURT: I didn't think so.

MR. ROSSIELLO: $7,894.98.

THE COURT: That's what I got. So, you see, Mr. Rossiello, we are in agreement on one thing. Okay.

For the reasons stated on the record, in open court, then, today, the funds will be distributed as follows.

Oh, incidentally, I think the record discloses but the settlement money has been held by the Clerk, has been invested and is presently invested in a Certificate of Deposit which will not mature until June. That, as I understand it from our conference in chambers, will probably not create any problems because Mr. Rossiello is considering appealing this order.

Therefore, the distribution will be by memorandum order as follows:

[6]

To Allstate Insurance Company, the sum of $40,438.50 as and for the compensation lien.

To Ernest Rossiello, the sum of $3,824.05 as and for reimbursement of expenses.

To Ernest Rossiello the sum $7,894.98, as and for attorney's fees.

And to William Johnson and Dorothy Johnson, the entire balance including all interest which accrues thereon until the fund is disbursed.

Now, Allstate requested a reimbursement of the $3500 fee which it paid to Mr. Rossiello during—as a result of

the compensation proceedings as well as some interest which it was obliged to pay on the comp award as a penalty.

It is my judgment that Allstate is not entitled to the $3500 or the interest as compensation paid to Mr. Johnson and, therefore, part of its lien.

I only have one final comment to make. As I have pointed out to Mr. Rossiello, if he appeals this judgment, and he has every right to do so, the effect of his appeal will be, in my judgment, his urging in his own behalf that his fee be increased and that Mr. Johnson's recovery be diminished. In those circumstances he will be in a position of conflict with his client and some arrangements will have to be made in the Court of

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Appeals to provide Mr. Johnson with representation.

I offer to do that. That will be the order.

MR. ROSSIELLO: Right. I will notify the client, Judge, of the potential conflict of interest in accordance with the canons of ethics, and will notify the Court very shortly about the plaintiff's decision.

THE COURT: I don't mean to prolong this, Mr. Rossiello, but I don't see how it is potential. It is unequivocal, but it will be a conflict because as I understand the situation here, if you appeal—and I realize you disagree with my approach in this case—if you appeal, the consequences, if you should prevail, cannot help but be to reduce the payment to Mr. Johnson and increase the payment to Mr. Rossiello.

So—now, here is a copy, fellows, of the order, and here, Rita, is the original order, and that closes it.

MR. TREACY: May I ask your Honor that since it hasn't been done previously, that Mr. Rossiello's contract with his client be made a part of the record.

MR. ROSSIELLO: It is already.

THE COURT: I thought it was.

MR. ROSSIELLO: It is. It's attached to several documents. It's attached to the original motion for adjudication.

THE COURT: I think that's right. It is.

[8]

MR. TREACY: Thank you, your Honor.
MR. ROSSIELLO: Okay. Thank you, Judge.
THE COURT: Okay, fellows.
MR. ROSSIELLO: Oh, one other thing: Judge,—well, let me file my notice of appeal first and then I will make my motion to stay execution later on.
Thank you. Nothing else.
THE COURT: Okay.
WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE DAY AND DATE AFORESAID

[9]

[Certificate of Court Reporter omitted in printing.]

Telephone (312) 346-8920

Law Offices
Ernest T. Rossiello

180 North LaSalle Street
Chicago, Illinois 60601

CONTINGENT FEE AGREEMENT

I hereby employ and appoint ERNEST T. ROSSIELLO as my attorney to represent me in the settlement, adjustment or prosecution of my claim against Sioux City & New Orleans Barge Lines, Inc. arising out of a claim in admiralty which occurred on or about the 18th day of January, 1977, at or near INGLA/ 12600 South Butler Drive, Chicago, I-linois, and I hereby agree to pay the said attorney as compensation for his services, and hereby assign to him, 40 * % of any sums obtained or recovered therefrom by suit, settlement or otherwise. *[50% in the event a successful appeal is prosecuted, or a retrial is granted.]

I hereby authorize the said attorney to incur necessary and reasonable expenses in connection with the settlement, adjustment or prosecution of said claim and agree to compensate him in the amount of the actual expenses so incurred, regardless of the outcome thereof.

Signed at Chicago, March 3, 1977.

Witness:

I hereby agree to prosecute the above matter entrusted to me and to charge no fee unless recovery is had and to make no settlement without the written consent of my client.

PLAINTIFF'S EXHIBIT C

[1]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 535

WILLIAM JOHNSON,

Plaintiff,

vs.

SIOUX CITY & NEW ORLEANS BARGE LINES, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE PRENTICE H. MARSHALL, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, April 11, 1980, at 9:30 o'clock a.m.

PRESENT:

ERNEST ROSSIELLO, Esq.,
on behalf of plaintiff.

[2]

THE CLERK: 77 C 535, William Johnson, Jr. vs. Sioux City & New Orleans, et al., plaintiff's motion for stay of execution of judgment.

THE COURT: Good morning, Mr. Rossiello.

MR. ROSSIELLO: Good morning, Judge. Ernest Rossiello for plaintiff.

THE COURT: What I think we should do is, the Clerk is not under any compulsion at the present time to pay this money out, is he?

MR. ROSSIELLO: No, no. The certificate matures June 23, 1980.

THE COURT: All right. What I would suggest that we do, as I told you on the phone yesterday or the day before, Mr. John Schmidt has agreed to represent Mr. Johnson. When I spoke to Mr. Johnson the other day on the phone, to advise him that I had—made arrangements for counsel for him, he specifically asked about this, as you can well-understand, and whether he and his wife were going to be getting any money.

I said, "I can't answer that question for you, because I believe that Mr. Rossiello is going to be coming in, and I just—I can't answer the question."

So what I would suggest we do is this: Enter and continue this motion for a couple of weeks—is all right with

[3]

me, if that's convenient for you, and re-serve—serve a copy of it on Mr. Schmidt, or drop a copy in the mail to him so that he can appear in behalf of Johnson and tell us what his position is.

I take it that Mr. Treacy doesn't object to it because he isn't here.

MR. ROSSIELLO: Well, I don't see why he would. Normally—

THE COURT: He's got some money coming, doesn't he?

MR. ROSSIELLO: Right. But the funds are in the registry of the Court, and these motions to stay execution of judgment pending appeal are usually pro forma. I don't see any reason why the motion would not be granted.

THE COURT: Well, I agree, sir, that they are usually pro forma, but this is not a usual case.

MR. ROSSIELLO: Well,—

THE COURT: You see, as of now you still represent Mr. Johnson, and you are here asking me to enter an order saying Mr. Johnson can't have money which I have awarded to him.

Now, I think ultimately we are going to do that, Mr. Rossiello, but I do not agree that this is a pro forma situation.

MR. ROSSIELLO: Out of deference to the Court's feeling on the motion, if you would like to continue it, that will be okay with me.

THE COURT: I think Mr. Johnson is entitled to be

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heard, and we will agree that he is not being heard today other than through me.

MR. ROSSIELLO: Right. You know, I checked the Code of Professional Responsibility on this, and I could not find anything in support of your Honor's viewpoint—

THE COURT: Which viewpoint?

MR. ROSSIELLO: About there being a conflict between me and Mr. Johnson. There was no conflict between Mr. Johnson and I here in this Court. Any conflict that might have been created was created in the Court's order of March 28.

And under—as I understand the Code of Professional Responsibility, an attorney is entitled to enforce his lien, even if it does mean that there is—this is one of the exceptions—of the conflict between an attorney and a client.

So maybe I should send your Honor a copy of the Canon that I am talking about.

THE COURT: Mr. Rossiello, I am not being critical of you, sir, with regard to your position in this case—professionally critical of you.

MR. ROSSIELLO: Thank you.

THE COURT: But as I understand your position, you want 40 percent, in round numbers—you want 40 percent of 40,000 bucks, and I have said you are not going to get that $16,000. Bill Johnson is going to get it. You

[5]

are going to the Appellate Court to try to get the Appellate Court to say Marshall's wrong, Rossiello gets it.

Now, if that isn't a conflict between an attorney and a client, then, Mr. Rossiello, I don't know what a conflict is.

MR. ROSSIELLO: Well, I will send you a copy—

THE COURT: If you want to continue to represent Mr. Johnson, Mr. Rossiello, I will permit you to do so. It was my understanding that you did not want to continue to represent him, because you said to me, when I entered the order, as I understood you—"I understand the potential conflict, Judge, and I will talk to Mr. Johnson, and I will be back to you."

And the message that I got was you wanted me to get him a lawyer, and I got him a lawyer. I got him the best one I could find.

MR. ROSSIELLO: I'm sure you did.

THE COURT: You see. But he is still your client. You still appear in his behalf. And if you want to go to the Court of Appeals, Mr. Rossiello, carrying water on both shoulders, far be it from me to remove you from the case.

MR. ROSSIELLO: Well, as I—I think that your Honor—

THE COURT: Far be it from me.

MR. ROSSIELLO: I understand. I don't want to make

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an issue of this, but I think what has been created is a very embarrassing situation, very embarrassing, mostly for me, and also the public relations effect of this does not make me look very good in front of my client, and in front of the Court of Appeals.

THE COURT: Mr. Rossiello, you acting in behalf of your client, purporting to act in behalf of your client, asked me to render a decision.

MR. ROSSIELLO: That's correct.

THE COURT: I did so. You don't like the decision. That is true with 50 percent of the people who appear before me, you know.

The law is not a game, Mr. Rossiello, but it is like baseball. There aren't any ties. Everyday 50 percent of the people walk through that door back there a loser.

MR. ROSSIELLO: That's for sure.

THE COURT: And 50 percent walk through that door a winner.

MR. ROSSIELLO: Right. But I—

THE COURT: You expected to walk out a winner, and you are walking out a loser, and you don't like it. And if I were you, I wouldn't like it either.

MR. ROSSIELLO: Judge, it was not my idea that counsel be appointed for Mr. Johnson. Your Honor was the one that mentioned the conflict of interest, and your

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Honor also very graciously, of course, offered to appoint a lawyer for Mr. Johnson.

But I have checked the Code of Professional Responsibility, and I believe I am within one of the exceptions in the Code which allows me to maintain a position which may be adverse to the client if I am enforcing an attorney's lien.

Now, I will be glad to send you a copy of it, but—

THE COURT: Mr. Rossiello, no one questions that. The question is, who is going to speak for the client. That is the question.

If you think for one minute that I look with disfavor on your effort to enforce what you regard to be your rights under your fee contract with your client, you are wrong.

MR. ROSSIELLO: I'm sorry if I'm giving that impression.

THE COURT: You are wrong. But I say to you again, if you think that you can go to the Court of Appeals and stand up for ten minutes, or whatever length of time they give you, and speak in behalf of Ernest Rossiello, appellant, and then get up and speak in behalf of William and Dorothy Johnson, appellees, go right ahead and try to do it.

My advice to you is not to, because I think you are going to have three judges on the 27th floor that are not going to look with favor on your performance. But if you

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want to try to do it, Mr. Rossiello, you do it.

MR. ROSSIELLO: It was done in the Valentino case, Judge, which is one of the leading cases in this area, and

it's been done in may other cases. In Melvin vs. Strachan Shipping Co. in the Fifth Circuit—

THE COURT: Mr. Rossiello, please, if you don't want Mr. Schmidt to represent your client, I will get in touch with Mr. Schmidt and tell him so.

MR. ROSSIELLO: I think it would be antagonistic.

THE COURT: And I will tell Mr. Johnson so. I will also memorialize my views in the record.

MR. ROSSIELLO: They have been so memorialized, I believe. I have explained this to Mr. Johnson very thoroughly—

THE COURT: You told me on the phone yesterday that you have already had a docketing conference in the Court of Appeals.

MR. ROSSIELLO: Right, on Wednesday morning.

THE COURT: Are you the appellant?

MR. ROSSIELLO: The appellant is William Johnson for the use of Ernest T. Rossiello.

THE COURT: Now, who appeared in behalf of—who appeared in behalf of William Johnson for his own use?

MR. ROSSIELLO: No one.

THE COURT: That's what I thought.

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MR. ROSSIELLO: The reason is, Judge, as I understand the law in this area, regardless of what the Court of Appeals does, if it follows the body of decisions, the plaintiff will not be eligible to recover anything out of the settlement fund. That is in line with the Valentino decision, and the Fontana decision, and even the Bloomer vs. Liberty Mutual decision which your Honor apparently relied on two weeks ago.

Those cases have all unequivocally said that the attorney's fee is a first charge on the settlement fund, as in equity it should be.

And it also said that the insurance carrier is not obligated to make any proportionate contribution toward the longshoreman's attorney's fees and expenses. There is no decision that says that the stevedore's lien is prior to the attorney's lien.

Now, it was a very harsh result that had to eventuate, but we are bound to follow the law whether we agree with it or not.

THE COURT: That's right.

MR. ROSSIELLO: And it was very unfortunate—I tried very hard for 18 months, as you know, to get Allstate to contribute—

THE COURT: Now, look, Mr. Rossiello, we have been

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over this. The only question that—the real question today, of course,—because, you see, Mr. Johnson isn't here today either. You and I told Mr. Johnson that he didn't need to come today, didn't we?

MR. ROSSIELLO: Right.

THE COURT: And "we" I used advisedly, Mr. Rossiello, because you told him that on the phone, as I understand it.

MR. ROSSIELLO: That's correct.

THE COURT: And I told him that on the phone.

MR. ROSSIELLO: Right. And I also sent him a copy—

THE COURT: So nobody stands here today for Bill Johnson other than Ernest Rossiello.

MR. ROSSIELLO: Judge, Mr. Johnson has already received over $41,000 in compensation, and has open medical benefits for life because of my efforts.

Now, I can't help the fact that Allstate has a $41,000 interest in that settlement, and they are entitled to get reimbursed, and they don't have to contribute to my attorney's fees. But there is no case that says they get paid before I do.

Now, I explained all that to Mr. Johnson. I have expended approximately 150 hours since this case was settled 18 months ago, to try to resolve this lien situation. It is a whole new case that's been made.

Now, it's very embarrassing. If you want to sua sponte appoint a lawyer for Mr. Johnson in the Court of

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Appeals, that is up to you, but I think—but whatever you want to do, that's okay with me.

But as far as I'm concerned, this situation has arisen in other Circuits, and the plaintiff did not have his own individual lawyer. The Valentino case is exactly on point. That is a 1977 Second Circuit case, which is still the law, which was acknowledged by the Supreme Court on March 3rd of this year as being the law.

Certiorari was denied in that case, and it is a very unfortunate result which I think is going to happen. But if the Court of Appeals follows the cases, Mr. Johnson unfortunately will not get anything under the third-party settlement. There may be some interest left over, but that's something else.

THE COURT: Well, we have digressed from that which first brought you in here, Mr. Rossiello.

MR. ROSSIELLO: If you want to continue this motion to get Johnson in here, or someone else, that's okay. We can knock it over a week. I'm going to be gone most of the month of May. My brief is due in the Court—

THE COURT: I would suggest—I'm not going to be in the latter part of next week. I think we should put it over for two weeks, but what concerns me now is this—what I regard as ambivalent position that you take with respect to who should represent Mr. Johnson.

[12]

MR. ROSSIELLO: Judge, I have nothing to fear or to hide. If you want to appoint a lawyer for him, okay. I think it is just going to antagonize things, and it is going to make things more embarrassing than they already are. Mr. Johnson hired me in 1977 to represent him.

THE COURT: Mr. Rossiello, I am saying to you, and I say it now—the thing is, you see, I suggest to you that you feel uncomfortable, and I can understand why.

MR. ROSSIELLO: Well, it's very embarrassing.

THE COURT: But I say to you again, if you wish to continue to represent Johnson's interests, I'm not going to remove you from the case. I haven't removed you thus far.

MR. ROSSIELLO: Right.

THE COURT: When I raised the conflict with you, you said you perceived it. You would discuss it with Johnson,

and you communicated with my secretary that you wanted me to obtain counsel for him, and I have done so.

Now, you don't know whether you want me to.

MR. ROSSIELLO: No, I wrote him a letter, and I sent you a copy, saying that if he wanted a lawyer, he should call Judge Marshall and the Judge would appoint him one.

THE COURT: I'm going to leave the record the way it stands.

MR. ROSSIELLO: All right. Why don't we leave it status quo—

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THE COURT: Leave it the way it stands. I will see you in two weeks. Please serve Mr. Schmidt.

MR. ROSSIELLO: Yes, okay. What date would that be?

THE COURT: Whatever two weeks from today is. Your calendar is the same as mine.

WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE DAY AND DATE AFORESAID

[14]

[Certificate of Court Reporter omitted in printing.]

Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JOHNSON, JR.
for the use of ERNEST T. ROSSIELLO, Attorney,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Certiorari has recently been granted (October 6, 1980) by the Supreme Court in *Rodriguez v. Compass Shipping Co., Ltd.* (Docket No. 79-1977), also involving §933 of the Longshoremen's and Harbor Workers' Compensation Act. Certiorari was granted there to review the equitable considerations under 33 U.S.C. §933(b) in allowing a longshoreman to maintain his own third party action even though more than six months had elapsed from receipt of a compensation award and

the express language of the Act [§933(b)] had already appeared to assign the right of action to the stevedore. Incidental to a decision on the merits of *Rodriguez* will be acceptance or rejection by the Supreme Court of the Second Circuit's decision to limit *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956) to the facts of the case where the stevedore and vessel owner were insured by the same carrier.

Directly related to the review granted in *Rodriguez* is the nature of the conflict of interest between longshoreman and stevedore in bringing a third party action and the applicable purpose of the Longshoremen's and Harbor Workers' Compensation Act in allowing a stevedore to recoup, through a third party recovery, its losses occasioned by payment of compensation. [Questions (2) and (3) in *Rodriguez'* petition for a writ of certiorari].

Implicitly necessary to a full and fair consideration of allowing a longshoreman to sue in his own behalf, even after 6 months from a compensation award, is a discussion of his right to choice of counsel; a discussion of the conflict of interest, *vel non*, between the longshoreman and his employer in bringing the third party action against the vessel owner; what constitutes an "assignment" under §933 of the Longshoremen's and Harbor Workers' Compensation Act; and, a discussion of the fact that distribution of the third party recovery fund under §933(e) will be no different, as far as the stevedore is concerned, whether the action is brought by the longshoreman himself pursuant to §933(a), or by the stevedore by virtue of an assignment under §933(b). A treatment of the balancing of the equities over which person is better suited to bring a third party action and who is more apt to benefit the employee, for whom the

LHWCA was created, is something which the Supreme Court is surely to deal with in *Rodriguez.*[1] For, it is common knowledge, the stevedore does not bring third party actions for fear of antagonizing its customers, the vessel owners. See *Rodriguez,* and *Valentino v. Rickners Rhederi,* 552 F.2d 429. Strong arguments can be made that the longshoreman will pursue the action more vigorously than his employer.

In *Czaplicki,* certiorari was granted because of the importance of the question presented in the administration of the LHWCA. [*Czaplicki,* 351 U.S. at 528]. Likewise, in the case at bar, also involved is a question of great importance in administration of the Act. Certiorari should be granted here because of the equitable considerations involved in the tripartite of stevedore-longshoreman-attorney over who should rightly bear the cost of litigation where a benefit is bestowed upon the stevedore. Since this is a matter of great importance to the consistent and uniform administration of the LHWCA, and the decision of the Supreme Court here will affect thousands of longshoremen, their lawyers, stevedores and insurance carriers, the petition for a writ of certiorari should be granted.

Congress made a deliberate choice in the amendments of 1972 to allow the longshoreman the right to bring his own action under §933(a), *Valentino, supra.* With that

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[1] An injured longshoreman has the right under the Act to choose his own doctor for medical treatment [33 U.S.C. §907]. A corresponding right to choose a lawyer has also been sanctioned by Congress in §933(a), yet, the panel of the Seventh Circuit feels the stevedore is the one which should bring suit [See Pet., p. 11a]. This will undoubtedly be something which the Supreme Court will treat and discuss in *Rodriguez* when it hears the case on its merits.

came the corresponding duty to pay his own attorney's fees. Out of the net proceeds[2] of the settlement or judgment, the stevedore was entitled to equitable reimbursement for its compensation payments *before* the longshoreman could recover anything from the third party actions, for, not to reimburse the stevedore first would assure the longshoreman of a double recovery and would guarantee him a supplement from the third party action above his statutory benefits and place him in a position better than the average civil litigant.

A panel of the Seventh Circuit, in the case sought to be reviewed, has made many pronouncements which deviate very far from the accepted standards of application of the Longshoremen's and Harbor Workers' Compensation Act [see Pet., pp. 9a-11a] and has come to a most inequitable and incongruous conclusion. This conclusion gives both the stevedore and the longshoreman a windfall at the sole expense of the attorney who exerted approximately 300 hours of time to create the settlement. In addition, all of the reasons in support of its decision are clearly erroneous, namely,

(1) The panel equated attorney's fees under §928 with attorney's fees under §933(a). These sections are clearly mutually exclusive and involve two separate causes of action.

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[2] "Net proceeds" has been uniformly construed to mean the balance of the third party fund remaining after attorney fees and expenses. See *Bloomer v. Liberty Mutual*, 100 S. Ct. 925 (1980), 48 LW 4211 at 4213 (Docket No. 78-1418), fn. 6, citing 105 Cong. Rec. 12674 (July 6, 1959) and 105 Cong. Rec. 15343 (August 10, 1959); and 48 LW at 4214, 4215 fn. 13. See, too, *Nacirema v. Oosting*, 456 F.2d 956 (4th Cir. 1972). The panel of the Seventh Circuit apparently disregarded this construction, although informed of it in the record below [Appellant's brief, p. 11].

(2) The panel erroneously believed that the separate award of $3,500.00 in attorney's fees under §928(b) of the Act, which is intended to be a penalty against the employer for underpaying compensation, and which in no manner affects or diminishes the longshoreman's award [see §928(d)] was "payment in full [to Rossiello] from the stevedore" [Pet. p. 10a] for his efforts in generating the third party settlement. This is blatant error, for, generation of the $64,000.00 settlement with the vessel had nothing whatsoever to do with the compensation case against the stevedore, as they are two separate and distinct funds and causes of action.

(3) The panel erroneously believed that allowing the plaintiff's lawyer to take his fee on the *full* $64,000.00 settlement would allow recovery exceeding the statutorily prescribed fees—when §933(a) allows the longshoreman to retain and choose his own lawyer, and this includes setting the lawyer's compensation.[3]

(4) It would contravene "Congress' statutory directive that the compensation tribunal determine the amount of the fee." [Pet., p. 10a]. This is plain error because nowhere in the Act is there any provision which directs the United States Department of Labor to regulate the attorney's fees in third party actions. Congress could

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[3] The panel erroneously believes Johnson would have been better off if the stevedore had sued for him. Petitioner respectfully disagrees with this view. Most plaintiffs' personal injury litigation is undertaken on a contingent fee basis. Even if the stevedore's lawyers had taken the case on a 33⅓% contingent fee basis there still would have been nothing left for Johnson, as the attorney's lien for fees and expenses would have reduced the recovery to less than the amount of compensation paid, and there would have been nothing upon which to predicate "80% of the balance to Johnson" as the Seventh Circuit suggests. [Pet., p. 10a].

have provided a limit on the amount of attorney's fees in negligence actions, such as in Federal Tort Claims Act cases, but it chose not to.

These are some of the things which the Supreme Court will inevitably face in deciding *Rodriguez*, and how they bear on the right of an injured longshoreman, who has already received an award of compensation and had his attorneys' fees paid, but who has decided, after the time stated in §933(b), to choose his own lawyer and bring a third party action. The stevedore has no statutory "lien", but only a judicially created right to reimbursement, *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-980 (5th Cir. 1975) It appears the longshoreman is in a position to enforce his claim for negligence more effectively himself —as he does not run the risk of alienating a customer as would the stevedore who sues the vessel owner.

Finally, it has been a long recognized rule of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts from that fund. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). Judge Weinfeld in *Fontana* reiterated "A further compelling consideration which may not be ignored is that the entire act negates any theory that an injured employee is entitled to both compensation from his employer and damages from third parties . . . [the employee] is given the choice of election but he may have both compensation from his employer and damages from third parties." *Fontana*, 106 F.Supp. at p. 463.

Here, a panel of the Seventh Circuit has come to a most inequitable result by allowing the longshoreman a double recovery, and ordering the stevedore reimbursed in full by giving its right to reimbursement priority over the attorney's lien for fees and expenses. The

distribution of the third party fund should be the same under §933(a) as it is under §933(b) as the Supreme Court held in *Bloomer* last term.

CONCLUSION

The petition for a writ of certiorari should be granted and this case heard on its merits along with *Rodriguez v. Compass Shipping Company, Ltd.*, Docket No. 79-1977 as a related case.

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No. 80-359

IN THE

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ERNEST T. ROSSIELLO, Attorney,
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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR WILLIAM JOHNSON, JR. AND DOROTHY JOHNSON IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, is set forth in the Appendix to the petition (pp. 2a-12a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly construed a lawyer's contingent fee agreement in

a longshoreman's personal injury action to apply to the actual amount received by the longshoreman, excluding an amount payable to the longshoreman's stevedore in satisfaction of a lien.

STATEMENT OF THE CASE

The sole issue presented in this case is whether the District Court and the Court of Appeals correctly determined that the contingent fee payable to attorney Ernest T. Rossiello ("Rossiello") out of the proceeds of a personal injury action against a shipowner should be calculated on the actual amount received by Rossiello's clients, William B. and Dorothy Johnson ("Johnson"), or whether, as Rossiello contends, he is entitled to a percentage of the entire gross proceeds paid by the shipowner including that portion not payable to Johnson but subject to the lien of his stevedore as reimbursement for a previous workmen's compensation award. The facts of the case are set forth in the Court of Appeals opinion and can be summarized briefly.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 (the "Longshoremen's Act"), permits an injured longshoreman to collect workmen's compensation payments from his stevedore and to sue in tort the shipowner upon whose vessel the injury occurred. To prevent double recovery the stevedore retains a lien in an amount equal to its compensation payments.

Longshoreman Johnson, after being injured in a barge accident, filed a claim for workmen's compensation against his stevedore, International Great Lakes Shipping Company (now represented by its insurer, Allstate Insurance Company), and a negligence suit against the owner of the

barge, Sioux City and New Orleans Barge Lines, Inc. Rossiello represented Johnson in both actions.

In the workmen's compensation action, a Department of Labor administrative law judge ordered that the stevedore pay benefits to Johnson in the amount of $40,438.50 and, pursuant to 33 U.S.C. § 928, ordered that the stevedore pay Rossiello a legal fee in the amount of $3,600. Subsequently the negligence action against the shipowner was settled for $64,000, of which $40,438.50 was subject to the stevedore's lien for reimbursement.

Rossiello had negotiated a contingent fee agreement with Johnson for the prosecution of his claim against the shipowner. The agreement provided that Johnson "hereby assigns to Rossiello 40% of any sums retained or recovered therefrom by suit, settlement or otherwise." Rossiello contended that this agreement assigned to him 40% of the entire $64,000 proceeds, notwithstanding that $40,438.50 inured to the stevedore as reimbursement for its compensation payments and that Rossiello had already received $3,600 for his services in generating the compensation award. District Court Judge Prentice H. Marshall rejected Rossiello's contention and ordered that Rossiello's 40% fee be calculated on the basis of Johnson's actual recovery from the shipowner ($64,000 less $3,824.05 in expenses and less the $40,438.50 compensation lien).

Johnson's gross recovery is thus $19,737.45, which yields Rossiello a fee of $7,894.98 in addition to the statutory award of $3,600; and Johnson's net recovery from the shipowner is $11,842.47. In contrast, if Rossiello were to prevail in his contention, he would receive a fee of $25,600; his client, Johnson, would receive nothing; and there would remain insufficient funds, $34,575.95, to pay the stevedore's lien in full.

In a unanimous per curiam opinion, the Court of Appeals upheld Judge Marshall's order.* The Court of Appeals found that as a matter of contractual interpretation the 40% fee should be applied only to the actual net recovery by Johnson. The Court noted that the agreement was apparently drafted on the assumption that the stevedore would share proportionately in the legal expenses of pursuing the negligence action, an assumption subsequently negated by this Court's decision in *Bloomer* v. *Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980). The "reasonable reading of the agreement," the Court of Appeals stated, "is that Johnson agreed to pay Rossiello 40% of any recovery over and above the amount inuring to the stevedore." The Court found this construction of the language of the agreement to be reinforced by strong equitable considerations, noting that any attorney's fee must be reasonable and that an agreement which attempted to charge a fee based upon a proportionate share of amounts not recovered by the client "would contravene one of the underlying assumptions of a fair and reasonable contingent fee contract."

The Court of Appeals also found its construction of the agreement to be supported by the Longshoremen's Act and its underlying policies. Since the Act provides expressly for an award of fees for the recovery of the compensation benefits, a further award based upon those funds "would amount to little more than a double recovery for services rendered in generating the compensation award and would contravene Congress's statutory directive that the compensation tribunal determine the amount of the fee." In addition, the Court of Appeals found that Rossiello's proposed construction of the agreement was incon-

* Judge Marshall arranged for Johnson to be separately represented on the appeal and this brief is filed on Johnson's behalf by his new counsel.

sistent with the Congressional intent, emphasized by this Court in *Bloomer,* to reduce litigation. The Court of Appeals stated:

> "We are cognizant of Congress's concern that negligence suits under the Act too often inure to the benefit only of the attorney, thereby needlessly increasing the volume of litigation generated by the Act. . . . Yet this is precisely the outcome proposed. Indeed, Rossiello would recover a fee of over $25,000 plus expenses of nearly $4,000 for a settlement that in practical effect leaves his former client in a poorer position that he occupied the day before filing suit against the shipowner."

The Court of Appeals noted that its conclusion that the contingent fee applied only to Johnson's net recovery eliminated any question of priorities between the lawyer's fee and the stevedore's lien since sufficient funds would exist to pay both the attorney's fee and the stevedore's lien in full.

ARGUMENT

The Court of Appeals decided as a matter of contractual interpretation that Rossiello's contingent fee percentage applied only to the actual amount recovered by plaintiff Johnson in the negligence action. There is nothing in this contractual interpretation which conceivably warrants review by this Court.

Rossiello devotes his petition for certiorari to an issue —the priority of the attorney's lien vis-a-vis the stevedore's lien in longshoremen's negligence actions—which the Seventh Circuit expressly did not reach. The Court stated that it is "unnecessary to consider the relative priorities of the attorney's lien and the stevedore's lien because the settlement fund is sufficiently large to pay both in full."

Moreover, as a reading of the Court of Appeals' unanimous opinion demonstrates, the Court's conclusion is clearly

correct. The alternative conclusion—that Johnson had contracted for an arrangement under which his attorney Rossiello would take the entire available proceeds—is unreasonable and, as the Court noted, even if it were stated in the clearest terms, unconscionable. In addition to the considerations of contractual language and basic fairness, the Court's conclusion is reinforced by the policies of the Longshoremen's Act, including the establishment of a statutory mechanism for awarding fees in compensation actions and the policy of avoiding unnecessary litigation. Any one of these considerations, standing alone, would justify the Court of Appeal's conclusion.

There is no conflict between the Seventh Circuit decision and the decisions of any other Court of Appeals or of this Court. The decisions of other Courts of Appeals cited by Rossiello, insofar as they are relevant at all, deal with the issue of priorities between the attorney and the stevedore which the Seventh Circuit expressly did not need to reach in this case. Further, had the Court of Appeals reached this issue of priorities, its decision could not, contrary to Rossiello's suggestion, be inconsistent with this Court's decision in *Bloomer* because in *Bloomer* this Court expressly declined to reach any issue of priorities. See 100 S. Ct. at 932, n.13.

CONCLUSION

The petition for writ of certiorari should be denied.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The stevedore has not filed any brief in opposition to the petition for a writ of certiorari. The co-respondent longshoreman, now separately represented in this petition, as he was in the court of appeals, has not cited a single case or authority to justify or support the anomalous and irreconcilable decision of a panel of the Seventh Circuit which affirmed a district judge's calculation of the plaintiff-longshoreman's contingent fee after first ordering the stevedore reimbursed in full for

the compensation payments it was obliged to make under a decision and order of the United States Department of Labor,* despite the fact that the stevedore contributed nothing to the third party settlement, and, in fact, resisted it and the compensation proceedings.

If certiorari is granted, the Supreme Court will hear this case on its merits and reversal of the decision below is inevitable, as it is in flagrant conflict with the rules of law in *Bloomer v. Liberty Mutual* decided by the Supreme Court last term, and irreconcilably in conflict with the holdings of the leading cases in this area of longshoremen's plaintiff's lawyer's fees. *Valentino v. Rickners Rhederi, G.m.B.H.*, 552 F.2d 466 (2d Cir. 1977), *Fontana v. Pennsylvania R. Co., etc.*, 106 F.Supp. 461, *aff'd*, 205 F.2d 151 (2d Cir. 1952), *cert. denied*, 346 U.S. 886 (1953), *Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir. 1973), *cert. denied*, 412 U.S. 949 (1973), *Strachan Shipping Company v. Melvin*, 327 F.2d 83 (5th Cir. 1964).

Here, we have a case which will affect all longshoremen's plaintiff's lawyers who settle third party claims for an amount less than sufficient to pay both the lien of the attorney and that of the stevedore in full."**

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* Nowhere in the LHWCA does the word "lien" appear. Rather, the courts have implied one, as the LHWCA speaks of the employer's equitable "right to reimbursement". See *Bloomer v. Liberty Mutual*, 100 S.Ct. (1980), fn.6.

** Mr. Justice Blackmun appears curious to see how the court will treat this issue when, as here, there is not enough to pay both the attorney's fees and the compensation "lien" in full and chided that disgorgement of compensation payments would not be inconsistent with the ruling in *Bloomer*, which prevented the longshoreman from recouping part of his expenses of litigation from which the stevedore benefitted. [See Pet., also, pp. 8-9].

This is the final lacuna to be filled in questions over distribution of settlements and verdicts in longshoremen's cases when the action is brought by the longshoreman himself under §933(a) of the LHWCA. The case should be heard on its merits because the panel of the Seventh Circuit rendered a decision which dehors the clear ruling of the Supreme Court that "There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought the action." *Bloomer*, 48 L.W. at 4212 (Docket No. 78-1418, Mar. 3, 1980), and dehors the entire body of case law in this area which provides that the expense of creating the settlement is, as in equity it should be, a first charge on the fund itself.

The consequences of allowing the decision below to stand would be to reward the stevedore for resisting the compensation claim and to unjustly enrich it [Mr. Justice Blackmun said in his dissent in *Bloomer*, "the stevedore has everything to gain and nothing to lose. The longshoreman [and his lawyer] takes the risk and the worry of the litigation and, if he gains enough, the stevedore is home free."] In the case at bar, the judges below ostensibly relied on *Bloomer*, but each of them based his ruling on the false premise that the stevedore is entitled to be reimbursed *first* before calculation of the plaintiff's lawyer's fee, and that the first $40,438.50 of the settlement "inured to the stevedore."*

The issue here is special and important to thousands of future longshoremen and their lawyers who take their

* Contrary to the Seventh Circuit's belief, the third party action against the vessel is not assigned to the stevedore, unless the longshoreman fails to bring his own action within six months after a compensation award. See 33 U.S.C. § 933(b).

cases on contingent fee agreements. In *Bloomer*, certiorari was granted to resolve the recurring question whether the stevedore was required equitably to reduce its lien to contribute towards the longshoreman's attorney's fees and expenses of suit, or whether the longshoreman, when he brought the action himself under §933(a), was obligated to pay his own expenses of suit, including attorney's fees. In *Bloomer*, the settlement was large enough to have a remainder wherefrom the longshoreman would recoup something from the third party action. Here, the settlement is not large enough.

This case is different from *Bloomer*, and very like *Valentino* and *Strachan Shipping Company, supra*, for, if we follow the arithmetic ranking of liens, and strictly adhere to the formula for distribution in §933(e) of the LHWCA then Johnson will receive nothing from the $64,000 settlement, as will all the other longshoremen whose cases are not settled for or result in verdicts sufficiently large to pay their agreed lawyer's contingent fees *and* the stevedore for all its compensation payments.

Valentino was such a case. The verdict was $5,000.00 and the stevedore had paid $15,488.31 in compensation. The stevedore intervened to capture the entire $5,000.00 and claimed the longshoreman's lawyer was entitled to no fee because no benefit was conferred on the client. The Second Circuit affirmed the district court's ruling ordering the lawyer paid his 40% contingent fee first, plus his costs, and the remainder to the stevedore's insurance carrier. The plaintiff derived nothing from the third party action.

Strachan Shipping Company v. Melvin is another case very similar to this one. The longshoreman brought his

own action under §933(a), which resulted in a verdict of $30,000.00. The stevedore intervened in the action to recover its $27,836.92 in compensation payments first before calculation of the lawyer's fee. The district judge ordered the lawyer's 40% contingent fee paid first on the entire verdict, plus expenses, then ordered the balance paid to the stevedore's insurance carrier. Again, the longshoreman received nothing from the third party action. The Fifth Circuit affirmed on equitable grounds, citing *Voris v. Gulf-Tide Stevedores*, 211 F.2d 549 (5th Cir. 1954).

Mr. Justice Marshall, speaking for the majority of the Supreme Court, noted that Liberty Mutual Insurance Company did not take issue with the proposition that the expenses of suit are a first charge on the settlement. [*Bloomer*, fn. 13].* However, the judges in both the northern district of Illinois and the Seventh Circuit apparently did. Mr. Justice Marshall explicitly in *Bloomer* [fn. 13] stated that the *Valentino* situation was not being addressed on March 3, 1980. However, this is the precise case for the Supreme Court to decide finally whether the fees and expenses of suit in a longshoreman's action under §933(a) are, as in equity they should be, a first charge on the settlement itself. And whether the words of Judge Weinfeld of the Southern District of New York should be memorialized by the Supreme Court:

> *Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses* and the employee becomes entitled only to any excess finally remaining. There is no reason why a recovery obtained against the third party by

* Footnotes 6 and 13 in *Bloomer* were also called to the attention of the panel of the Seventh Circuit during oral argument.

> the employee rather than the employer should be distributed differently. *The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself.* As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee.

See *Fontana, supra,* 106 F.Supp. at 463-4.

Unless the Supreme Court decides this final issue over attorney's fees under §933(a) this problem is likely to recur and will not be resolved. Almost every court which has been asked to decide the issue of priority of attorney's fee over compensation reimbursement has held the lawyer's fee a first charge on the settlement or judgment. The panel of the Seventh Circuit has rendered a decision predicated upon an erroneous interpretation of *Bloomer* as pronounced by the district court [see Petition, p. 7 and App. to Petition, p. 15a]. This is a most significant issue of federal law.

Finally, the position here sought, namely that the longshoreman derive nothing out of the third party action, is not one which is gladly embraced by petitioner. Petitioner represented Johnson in the trial court. He represents many longshoremen, and he is familiar with the maritime law in this area. The rule in *Swift v. Bolten* has been disapproved by the Supreme Court, therefore, the burden of the expense of creating a third party settlement rests entirely on the longshoreman. While petitioner takes no issue with this ruling, he urges the Supreme Court to decide the issue here whether a stevedore who did not intervene in the third party action until after the case was settled and dismissed, and who contributed nothing by way of services, effort, finances, resources or cooperation should, in law and equity, be entitled to disrupt the settlement fund and recover full reimbursement for compensation payments made under

the LHWCA before the plaintiff's lawyer takes his agreed contingent fee from the settlement under §933(a) which gives the longshoreman the right to bring his own private action, including choice of counsel. *Valentino v. Rickners Rhederi, G.m.B.H.*, 552 F.2d at 469 (2d Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

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